Office-Supreme Court, U.S.
FILED
APR 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-374

In the Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT FLANAGAN, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Sixth Amendment prohibit a court from overriding an accused's voluntary, knowing and intelligent choice to conduct his defense through joint counsel?

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The National Association of Criminal Defense Lawyers (NACDL) and the National Legal Aid and Defender Association (NLADA) submit this brief as amici curiae with consent of petitioners and respondent[1] in support of peti-

[1] Copies of the petitioners' letter of consent dated February 16, 1983 and respondent's letter of consent dated January 17, 1983 have been submitted to the Clerk of this Court along with this brief, pursuant to Sup. Ct. R. 36.2.

tioners Robert Flanagan, James Keweshan, Sidney Landis and Thomas McNamee. Amici urge that the decision of the Court of Appeals for the Third Circuit in these proceedings, *United States* v. *Flanagan*, 679 F.2d 1072 (3d Cir. 1982) (Pet. App. A1-A11),[2] be reversed.

INTEREST OF AMICI

The two organizations submitting this brief as amici curiae, the NACDL and the NLADA, represent lawyers, judges and others interested in our criminal justice system. The NACDL is a District of Columbia non-profit corporation with a membership of more than 2200 criminal defense lawyers, law professors and judges. Among the NACDL's stated objectives are the promotion and proper administration of criminal justice. The NLADA is a non-profit organization of public defender offices, legal services agencies and 2000 individual members, most of whom are engaged in private practice. Since 1911, the primary purpose of the NLADA has been to expand and improve the quality of legal services for the nation's poor.

Amici filed a brief supporting petitioners' cause in the appellate proceedings below. Because the question presented is of significant and general concern in the field of criminal law, amici respectfully submit this brief for the Court's consideration.

CONSTITUTIONAL PROVISION

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

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[2] The petitioners' Appendix, bound together with their Petition for Writ of Certiorari, will be referred to in this brief as "Pet. App."

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT

The Indictment

Petitioners are police officers in the Philadelphia Police Department and were members of that department's undercover team known as the "grandpop" squad, whose purpose was to apprehend perpetrators of street crimes. The squad's nickname arose from the fact that one of the officers would pose as an aged or infirm potential victim to attract assailants. In connection with their activities on this squad, a grand jury charged petitioners with conspiracy to violate the civil rights of citizens by arresting persons without probable cause and with substantive civil rights offenses stemming from false arrest or physical abuse. *See* 18 U.S.C. §§ 241, 242.

During the grand jury investigation, the officers retained the Philadelphia law firm of Sprague & Rubenstone. After meetings with the officers individually and as a group, their lawyers undertook to represent each of them throughout these proceedings.

The Motion For Disqualification

Soon after the return of the indictment, the government filed its Motion for a Hearing and to Prohibit Multiple Representation, seeking to disqualify the law firm from representing more than one of the police officers. Pursuant to Fed. R. Crim. P. 44(c), the district court held a hearing on disqualification, engaging in a lengthy colloquy with

each officer (Pet. App. A36-A76). Each officer, acknowledging the court's specific warning that joint counsel might not be able to differentiate his level of involvement from the other officers' or to cross-examine a co-defendant who became a witness against him, stated that he believed that no member of the team was guilty of the charges and that the defense he intended to present with his colleagues was a united one (Pet. App. A46-A48, A52-A54, A56-A59, A62-A66). Post-hearing briefs, solicited by the court, were submitted by the parties.

The District Court's Disqualification Order

After the hearing, the district court found that a conflict of interest was likely to arise at some future point in the proceedings (Pet. App. A16, A26). Based upon the officers' pre-trial motions, including the motion of three of them for severance from the fourth, the district court concluded that it was likely that one or more officer would wish to distinguish his activities from the other officers' (Pet. App. A17-A18). Noting that proof of the mens rea requisite for the charged offenses would depend upon the government's ability to establish each officer's oral statements, the court speculated that cross-examination of hearsay witnesses potentially might be impeded by counsel's obligation to preserve confidences of each client (Pet. App. A18).

Based upon what the court characterized as "extensive discussions" with each petitioner at the Rule 44(c) hearing (Pet. App. A14), the court concluded that each officer was fully and completely aware of the potential for conflicts; that each understood that separate counsel could present a joint defense, as well as separate defenses; that financial consideration played no part in each officer's decision; and that each officer wished to be represented jointly (Pet.

App. A15). The district court concluded that each petitioner's waiver of separate counsel was voluntary, knowing and intelligent (Pet. App. A16).

Notwithstanding the knowing waivers and the planned joint defense, the district court concluded that the petitioners' decisions must yield to the court's authority to supervise the conduct of members of the bar (Pet. App. A21, A25). The trial court held that disqualification was necessary to protect the petitioners' rights to effective assistance of counsel and to preserve the integrity of court procedures (Pet. App. A28). The court found that prevailing standards of professional ethics were set forth in the *Standards Relating to the Defense Function* § 3.5 and required that counsel not undertake joint representation in this case (Pet. App. A26-A27). Additionally, the court found that a conviction might be overturned on appeal if the adequacy of waiver were challenged (Pet. App. A25, A27).

The district court concluded that the firm would be disqualified from representing the officers jointly and from continuing to represent any one of them individually.[3]

The Court Of Appeals' Affirmance

The Court of Appeals for the Third Circuit, holding that the Sixth Amendment and the Due Process Clause of the Fifth Amendment afford no greater protection than "preventing *arbitrary* dismissal of the chosen attorney" (Pet. App. A8) (emphasis added), affirmed the district court. Rejecting part of the district court's analysis, the Court of Appeals stated that a "truly knowing and intelligent

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[3] Amici take no position in this brief whether the firm of Sprague & Rubenstone should be allowed to represent one of the petitioners if disqualified from representing them jointly.

waiver accepted by the court will insulate a conviction from later attack" (Pet. App. A9). The appellate court held, however, that a court's "concerns about breaches of professional ethics and about respect for the integrity of the court" justified disqualification as an appropriate measure under Rule 44(c) where an actual conflict was likely to "materialize" (Pet. App. A10).

SUMMARY OF ARGUMENT

Petitioners wish to forego separate counsel at their joint trial on charges that they, as a team of police officers, together violated the civil rights of citizens. Aware that the court and prosecutor perceived that their joint defense might favor one of their number at the expense of another, they nevertheless chose to speak with one voice. The lower court, however, in an exercise of its authority to supervise the conduct of attorneys, required them to obtain separate counsel, although not necessarily to present separate defenses.

Although the Sixth Amendment requires reversal of a conviction when counsel whose loyalty is split between conflicting interests is imposed unwittingly upon a defendant, it does not permit a court to reject an accused's free and knowing choice to be represented by counsel together with his co-defendants. Indeed, on account of the inestimable value of free choice, this Court has held that a layman charged with a serious crime has an absolute right knowingly to forego the assistance of counsel, although he may not be forced to do so, and he may enter instead upon the dangerous course of self-representation. The accused's free choice to present his defense through joint counsel cannot be rejected merely because professional ethics require caution and circumspection when a lawyer undertakes joint representation.

Rooted in speculation, the district court discovered authority to ensure fairness and ethical conduct and to overbear the petitioners' will. With no record evidence, the district court divined that petitioners' joint counsel might at some future point experience difficulties in cross-examining unidentified witnesses, prejudicial in an unspecified way, whereas separate counsel might not. Further, the court forecast—despite petitioners' affirmations to the contrary—that one or more of them might wish to differentiate himself from the rest in a way that joint counsel might not achieve, but separate counsel might.

The joint representation sought in this case does not constitute a violation of the *Model Code of Professional Responsibility*. Moreover, although the decision to be represented by counsel jointly with other co-defendants may be considered by some to be unwise, the courts cannot refuse to honor a knowing, voluntary and intelligent choice. Because the Sixth Amendment protects the right to choose counsel freely, the court and government can have no interest in an accused's choice of counsel. To deny petitioners in this case their right to joint representation is to deny them their constitutional guarantee of the assistance of counsel.

This case, in which the government raised the issue of disqualification by motion, is but one example of the numerous recent cases that reflect an increasing interest on the part of prosecutors in a defendant's choice of legal counsel.[4] Such motions now are widespread in cases in which a defense lawyer, representing one defendant, has represented a different co-defendant in prior proceedings,

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[4] *See generally* E. Margolin & S. Coliver, *Pretrial Disqualification of Criminal Defense Counsel*, 20 Am. Crim. L. Rev. 227 (1982) [hereinafter cited as Margolin & Coliver].

or previously has represented a government witness. The existence of these former relationships is commonplace for federal defenders and unavoidable in major federal criminal litigation, especially after lawyers have gained expertise. In addition, former government prosecutors representing criminal defendants often are targets of motions to disqualify.

Unlike the *Flanagan* case, the interest of third parties or the government in preventing disclosure or improper use of privileged information may be at issue under other circumstances. Although there is a great need to bring clarity to the balancing of interests in such cases, and to emphasize properly the strong interest of the defendant, *Flanagan* does not itself raise issues of such complexity.

The right of an accused facing imprisonment to decide the future of his defense, and knowingly to waive what some might call prejudice, must prevail over the interest of the government or the court in telling him that he and his lawyer are wrong.

ARGUMENT

I.

THE SIXTH AMENDMENT PROHIBITS A COURT FROM DISQUALIFYING JOINT COUNSEL, PURSUANT TO ITS AUTHORITY TO SUPERVISE THE CONDUCT OF ATTORNEYS, OVER AN ACCUSED'S KNOWING WAIVER OF POTENTIAL CONFLICTS OF INTEREST.

A. Fed. R. Crim. P. 44(c) Cannot Be Interpreted To Infringe The Accused's Right To Conduct His Defense Through Joint Counsel.

The trial judge in this case advised the petitioners that they had a right to separate counsel and discussed potential dangers of joint representation with them, as required by Fed. R. Crim. P. 44(c).[5] Neither the adequacy of the court's detailed inquiry nor the court's finding that each petitioner made a voluntary, knowing and intelligent waiver

[5] Fed. R. Crim. P. 44(c) reads as follows:

(c) Joint Representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

of his right to separate counsel has been challenged in these proceedings. Furthermore, petitioners have not disputed that, but for the fact that they knowingly have chosen to present a joint defense, their defenses might have diverged in this case. At issue is whether a conflict of interest is likely to arise, despite petitioners' assertions to the contrary, and whether disqualification of counsel is an "appropriate measure" under Rule 44 when the inadequacy of representation perceived by the court stems from the very fact that the petitioners have chosen joint representation.

Rule 44(c) established a procedure for the federal district courts to inquire whether defendants are aware of the potential danger of joint representation. Rule 44, which went into effect in 1980, simply implements what this Court has long held to be the duty of trial courts to make inquiries in cases of joint representation in order to protect the rights of a defendant. *E.g., Wood* v. *Georgia*, 450 U.S. 261, 272 (1981); *Cuyler* v. *Sullivan*, 446 U.S. 335, 347 (1980); *Glasser* v. *United States*, 315 U.S. 60, 71 (1942).

Despite the purpose of the rule, the procedure to be followed and the standards to be applied under it are not clear. Rule 44 requires that a court first determine whether a "conflict of interest is likely to arise," but defines neither "conflict of interest" nor "likely to arise." If the court finds that "good cause to believe no conflict of interest is likely to arise" is lacking, the court must take "such measures as may be appropriate to protect each defendant's right to counsel." It does not, however, identify the circumstances under which different alteratives are appropriate.

The distinction between "actual" and "potential" conflict, which decisions of the Court have established as the basis for deciding when, absent a waiver, an accused may assail a conviction on the ground of ineffective assistance of counsel, *e.g.*, *Cuyler* v. *Sullivan*, 446 U.S. at 348-49, provides no guidance for the district courts in the context of a pre-trial inquiry under Rule 44(c). If the trial court discusses waiver with an accused, and the accused gives a knowing, voluntary and intelligent waiver, the line of authority requiring reversal absent waiver is inapposite.

In undertaking to give meaning to Rule 44, a court obviously cannot interpret it to alter or infringe a defendant's constitutional rights. The wording of the rule does not mandate an unconstitutional interpretation. According to the Rule 44 Advisory Committee Notes, obtaining a waiver is an appropriate measure. Fed. R. Crim. P. 44(c) advisory committee note. When a defendant is not competent to make a knowing, voluntary and intelligent waiver, alternative appropriate measures may be taken. However, when a potential conflict of interest stems from aspects of their joint representation that defendants knowingly control, the only appropriate measure is to insure that they intend to waive any conflicts knowingly, voluntarily and intelligently, and that their waivers appear in the record.[6] Though Rule 44 does not specify it, the Sixth Amendment protects an accused's right to conduct his defense through joint counsel. Because of that protection, Rule 44 cannot be interpreted as authority to reject a knowing waiver.

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[6] The waiver, of course, must meet the constitutional standard of a knowing, voluntary and intelligent waiver. *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). In this case, the district court found that petitioners' waivers satisfied the constitutional standard (Pet. App. A16).

B. The Sixth Amendment Protects The Accused's Right To Conduct His Defense By Selection Of Joint Counsel.

1. The accused's right to conduct his defense through joint counsel is an independent right.

The Sixth Amendment does not provide that a defense shall be made for an accused against his will: Rather, "it grants to the accused personally the right to make his defense." *Faretta* v. *California*, 422 U.S. 806, 819 (1975). The necessary implication of the Amendment is that the accused enjoys the right to the assistance of counsel who will conduct the defense he chooses. Concommitantly, the profound choice whether to retain counsel singly or with his co-defendants is an essential part of an accused's Sixth Amendment right. This right cannot lightly be abridged.

An accused's Sixth Amendment rights include the right to determine his own defense. In *Faretta* v. *California*, the Court held that an accused's right to forego the assistance of counsel, and instead to represent himself on a felony charge, is an independent right of self-representation included within the protections of the Sixth Amendment. The Court found that the structure of the Amendment necessarily implied the right of self-representation because the rights enumerated in the Amendment, essential to a full defense, are given personally to an accused. *Id.* at 818. The Court held also that the Amendment's guarantee of counsel itself supports the conclusion that the rights belong to the defendant personally, because

> [i]t speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing

> defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.

Id. at 820.

An accused's right to decide whether his defense will be guided separately from his co-defendants or jointly with them must be included in his right to accept the assistance of counsel or to reject it altogether.[7] The right to select a particular attorney is "the most important decision a defendant makes in shaping his defense." *United States* v. *Laura*, 607 F.2d 52, 56 (3d Cir. 1979); *accord United States* v. *Curcio*, 694 F.2d 14, 25 (2d Cir. 1982). The choice of counsel is a significant decision because the attorney shapes defense strategies and has authority to make certain binding decisions. 607 F.2d at 56. Moreover, the choice will affect other constitutional rights because counsel will advise the accused to assert or relinquish other rights. *Id.* *See Brooks* v. *Tennessee*, 406 U.S. 605, 612 (1972).

The Court of Appeals for the Second Circuit has held that the right to choose joint counsel is an independent constitutional right. In *United States* v. *Curcio*, 694 F.2d at 22-23, 25-26, where two brothers sought to be represented by the same trial counsel, the appellate court held that waiver of the right to separate counsel could not be forbidden despite the considerable potential dangers of joint representation, if defendants act knowingly, because the right to counsel of one's choosing is of constitutional dimension. *Id.* at 22-23. *See also United States* v. *Curcio*, 680 F.2d 881, 884 (2d Cir. 1982); *United States* v. *Wisniewski*, 478 F.2d 274, 285 (2d Cir. 1973); *United States* v. *Sheiner*, 410 F.2d 337, 342 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969).

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[7] The right to joint counsel enjoys a long history. *E.g.*, *Glasser* v. *United States*, 315 U.S. 60; *Andersen* v. *Treat*, 172 U.S. 24 (1898).

2. Sixth Amendment protection of the accused's right to conduct his defense through joint counsel is absolute.

Given that decisions of this Court and of the Courts of Appeals establish that the Sixth Amendment protects the right of an accused to conduct the defense he chooses, including the important selection of joint counsel, the Court of Appeals in this case erroneously held that the Sixth Amendment affords protection only from "arbitrary" disqualification of counsel. The Court of Appeals relied upon *Davis* v. *Stamler*, 650 F.2d 477, 479 (3d Cir. 1981), which in turn refers to this Court's opinion in *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932).

The Court in *Powell* does, indeed, state that an "arbitrary" refusal to hear a party by counsel would violate due process:

> If in any case, civil or criminal, a state or federal court were *arbitrarily* to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. (emphasis added). However, this statement is not the central holding in *Powell* and does not apply to the instant case.

In *Powell* (the Scottsboro case), several young black men were tried for capital rape of two white women without counsel and were convicted. The Court held that in a capital case, where a defendant is incapable of making an adequate defense, the Due Process Clause of the Fourteenth Amendment requires a state court to appoint counsel. *Id.* at 73.

Interpreted literally, the above-quoted passage would imply that a state court's failure to appoint counsel in a capital case was unconstitutional only if arbitrary, which was not the holding of *Powell*. Moreover, the passage does not focus upon the distinction between civil cases and criminal cases, where the Sixth Amendment is applicable. Nor does it clarify the difference between cases in which a party demands certain counsel for purposes of delay, or counsel who has been disbarred, and those in which the request for particular counsel is made in good faith. Finally, a criminal defendant's Sixth Amendment right to counsel has been expanded greatly since those words were written in *Powell*. *See Gideon* v. *Wainwright*, 372 U.S. 335 (1963), *overruling Betts* v. *Brady*, 316 U.S. 455 (1942).

The Court in *Powell* cannot have intended to imply that the Sixth Amendment protects only arbitrary disqualifications, under circumstances such as those presented here. Moreover, *Faretta* v. *California* dispels any uncertainty whether an accused's Sixth Amendment rights to determine his defense must be respected. Because the Sixth Amendment protects an accused's right to choose joint counsel to present his defense, interference with this decision cannot be justified.

C. Joint Representation Does Not Violate The Model Code Of Professional Responsibility.

The Court of Appeals for the Third Circuit concluded that the district court's "concerns about breaches of professional ethics and about respect for the integrity of the court" (Pet. App. A10) justified disqualification. The decision of the Court is not clear whether the conduct at issue violates a Disciplinary Rule of the *Model Code of Professional Responsibility* or whether it is merely unseemly (Pet. App. A10). In either instance, the Court is

incorrect. Furthermore, *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978), relied upon by the Court of Appeals in this case, is incorrect for the same reasons that the Court here is incorrect. In this Section, the *Model Code of Professional Responsibility* is discussed; the next Section, Part D, rejects the argument that disqualification can be justified by a heightened concern over ethics or a desire to protect an accused from himself.

1. The Model Code of Professional Responsibility requires the client's waiver.

The *Model Code of Professional Responsibility* (1980), which governs the conduct of all attorneys practicing before the courts of the Eastern District of Pennsylvania,[8] states clearly that a lawyer may represent multiple clients with conflicting interests if consent is obtained from each after full disclosure and "if it is obvious that he can adequately represent the interest of each." *Model Code of Professional Responsibility* DR 5-105 (C) (1980).[9] The *Code* does not proscribe joint representation and it recog-

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[8] E. D. Pa. R. 14(iv)(B) adopts the Pennsylvania Supreme Court's ethical code, the *Model Code of Professional Responsibility*. Pa. R. D. E. 102.

[9] DR 5-105 states in full:

> Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer
>
> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105 (C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his

(footnote continued)

nizes that joint representation will not raise conflicts of interest in every case. *Model Code of Professional Responsibility* EC 5-17 (1980).

Furthermore, joint representation is regarded approvingly in some cases. Members of this Court have recognized its benefits. *Glasser* v. *United States*, 315 U.S. at 92 (Frankfurter, J., dissenting). The Court has not held joint representation to be unconstitutional. *E.g., Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978). Ethical codes and commentators upon ethics approve of joint representation. *Standards Relating to the Prosecution Function and the Defense Function, The Defense Function* § 3.5 commentary at 214 (1971); H. Drinker, *Legal Ethics* 103-31 (1953); *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1380-81 (1981). Probably most significant, the criminal defense bar finds joint representation ethical, and even necessary, in some cases. *See* Margolin & Coliver, *supra* n.4, at 253.

Not differentiating between civil cases, where the Sixth Amendment does not apply, and criminal cases, where it does, the *Code* embodies a view that counsel generally

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(footnote continued)

representation of another client, except to the extent permitted under DR 5-105 (C).

(C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or her firm may accept or continue such employment.

should decline to undertake joint representation, because of potential ethical difficulties. *See Model Code of Professional Responsibility* EC 5-16 (1980); *Standards Relating to the Prosecution Function and the Defense Function, The Defense Function* § 3.5 (1971). The concern reflected in the *Code* is that an accused may not elect joint representation knowingly, because counsel may not have told him of its potential dangers. Additionally, the *Code* reflects a concern that counsel may not be aware of conflicting interests and will be placed in an untenable position when a conflict arises.

The *Code* requires, however, only that clients and counsel confront the possibility of a conflict openly, and reach a resolution. The *Code* provides that a client knowingly may waive a conflict. As an additional requirement to protect the client, the *Code* provides that counsel should not undertake joint representation even after waiver if counsel believes that the representation he will render will not be "adequate." If there has been a waiver, counsel may be satisfied that the representation will be adequate, especially when the defendants desire a joint and harmonious defense. *See United States* v. *Curcio*, 694 F.2d at 28.

2. The courts erred in finding that an ethical conflict existed and that disqualification was justified on the record in this case.

The Court of Appeals for the Third Circuit was incorrect in holding that joint representation in this case would be proscribed by the *Model Code of Professional Responsibility*, because the waiver here was sufficient. The potential conflicts envisioned by the district court pertained primarily to the ability or inability of one or more of the petitioners, who were going to be tried jointly even if they

had separate counsel, to "distance" himself from the others.[10] Yet, the four petitioners, who are sophisticated, educated police officers, stated that they understood the risks of their joint representation, and voluntarily concluded that they wished joint representation; their lawyers, too, believed they could represent the petitioners adequately. In this case, petitioners' waivers were constitutionally sufficient; they knowingly chose to cast in their lots together. It is "obvious," as the *Code* requires, that joint representation would be adequate in this case.

Moreover, the factual record that was developed in this case does not support the conclusion that disqualification was appropriate. The only facts in the record establish that no conflict was likely to arise, since each petitioner stated that he believed his defense to be in harmony with the others' and that he intended to present it to the jury in that manner.

The party moving for disqualification must show that some specifically identifiable impropriety has occurred or will occur. *United States* v. *Mers*, No. 81-7777, slip op. at 2140 (11th Cir. Mar. 21, 1983); *United States* v. *Reese*, 699 F.2d 803, 805 (6th Cir. 1983); *Norton* v. *Tallahassee Memorial Hospital*, 689 F.2d 938, 941 (11th Cir. 1982). In rejecting the only facts in the record, the court and the government neither identified which petitioner's interest would diverge from the rest nor specified which witnesses would be ineffectively cross-examined.

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[10] If it is true that one or more petitioner would suffer cognizable prejudice simply from being tried with the others, the district court should have granted severance, which it declined to do in this case. Rather than taking the extreme step of disqualifying counsel, the court should have chosen the less intrusive alternative available to it, and should have granted severence. *See United States* v. *Agosto*, 675 F.2d 965, 970 (8th Cir.), *cert. denied, sub nom. Gustafson* v. *United States*, 103 S.Ct. 77 (1982).

When ethical conflicts of interest other than those arising from joint representation are created, an accused's constitutional right to select joint counsel may not prevent a court from disqualifying counsel. For example, if a defendant's selection of counsel would result in a violation of the Ethics in Government Act of 1978, 18 U.S.C. § 207, disqualification may be the correct result. *See United States* v. *Dorfman*, 542 F. Supp. 402, 410 (E.D. Ill. 1982).[11] Additionally, disqualification might be appropri-

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[11] The district court in the *Dorfman* case concluded that if a former United States attorney continued to represent defendant Dorfman, such conduct might violate the Ethics in Government Act, 18 U.S.C. § 207(b), which makes it a criminal offense for a former United States attorney to act as an attorney for any party other than the United States in any matter pending under his official responsibility while in government service. 542 F. Supp. at 410.

The district court concluded that it could prevent violations of Section 207(b) under Canon 1 and Canon 9 of the *Model Code of Professional Responsibility*. *Id.* Canon 1 provides that a lawyer must assist in maintaining the integrity of the legal profession and Disciplinary Rule 1-102 (A)(3) and (5) prohibits absolutely illegal conduct involving moral turpitude and conduct prejudicial to the administration of justice. Canon 9 provides that a lawyer must avoid even the appearance of impropriety and Disciplinary Rule 9-101 (B) prohibits acceptance of private employment in a matter in which a lawyer had substantial responsibility as a public employee. The district court expressed its confidence that if the former United States attorney were to represent defendant Dorfman, public confidence in the law and lawyers would be eroded. *Id.* The holding in *Dorfman* is premised on the fact that the obloquy of the so-called "revolving door" between public and private legal employment is of major concern to the legal profession and the public. Multiple representation of defendants in criminal cases, however, arouses no public outcry. None of the Disciplinary Rules or Ethical Considerations related to Canon 9 imply that multiple representation of willing defendants is an "appearance of impropriety" that must be avoided.

ate when necessary to prevent disclosure of secrets held by a former government attorney now representing a defendant. *See United States* v. *Miller*, 624 F.2d 1198, 1199 (3d Cir. 1980); *United States* v. *Ostrer*, 597 F.2d 337, 339-40 & n.5 (2d Cir. 1979). The defendant's ability to prevent disqualification when the conflict of interest pertains to his rights cannot empower him to force others to become victims of other types of ethical conflicts.[12] But the courts cannot, as has been done in this case, prevent a defendant from exercising his personal rights under the guise of elevating legal ethics.

The courts' erroneous assertion that joint representation will be unethical, made in order to reject a clear expression of an accused's Sixth Amendment right to conduct his defense by means of joint counsel, is simply a thinly-disguised means of telling the accused that the court thinks his choice of joint representation is a mistake. A court has no authority to dictate this decision to a defendant.

D. The Court Cannot Insist Upon Protecting The Accused From Theoretical Prejudice That He Has Waived.

If no violation of the *Model Code of Professional Responsibility* is at issue in this case, the trial court's "concerns about breaches of professional ethics and about respect for the integrity of the court" apparently stem from

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[12] *See also United States* v. *Agosto*, 675 F.2d 965, and *United States* v. *Cunningham*, 672 F.2d 1064 (2d Cir. 1982), where, in both cases, the courts necessarily considered the interests of former clients in protecting attorney-client privileges. In *Agosto*, the Court of Appeals noted that under Fed. R. Crim. P. 44(c) a court must "alleviate the effects of the conflict while interfering least with defendant's choice of counsel." 675 F.2d at 970.

a misconceived view that joint representation generally is less effective than separate representation. Decisions of this Court, however, make it clear that a trial court may not impose so-called protections upon an unwilling accused.

It is true that petitioners' claim that their right to select joint counsel overrides the court's interest in protecting their rights to conflict-free representation seems to run counter to several decisions of this Court. In *Holloway* v. *Arkansas* and *Glasser* v. *United States*, in which there were no waivers of potential prejudice, the Court acknowledged that joint representation sometimes results in disadvantage to an accused of such degree that the Sixth Amendment will not permit conviction to stand. 435 U.S. at 482; 315 U.S. at 70.

Yet, in spite of the fact that there may be disadvantages to joint representation so great that an accused could demand to have separate counsel appointed for him, this Court has recognized that an accused knowingly may waive his right to separate counsel. *Holloway* v. *Arkansas*, 435 U.S. at 482-83 & n.5; *Glasser* v. *United States*, 315 U.S. at 70.[13] The Court has never recognized that the district courts or the government may override a waiver of separate counsel, even in order to preserve rights of the accused.

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[13] *Accord United States* v. *Reese*, 699 F.2d at 805; *United States* v. *Curcio*, 694 F.2d at 26; *United States* v. *Curcio*, 680 F.2d at 886; *United States* v. *Agosto*, 675 F.2d at 970; *United States* v. *Cunningham*, 672 F.2d at 1073; *United States* v. *Alvarez*, 580 F.2d 1251, 1259 (5th Cir. 1978); *United States* v. *Cox*, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979); *United States* v. *Waldman*, 579 F.2d 649, 651 (1st Cir. 1978); *United States* v. *Armedo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975); *United States* v. *Garcia*, 517 F.2d 272, 276-77 (5th Cir. 1975); P. W. Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 Geo. L. J. 1075, 1130 (1979).

In another context, this Court has determined that the government's interests may equal the accused's interest in selection of the trial forum. In *Singer* v. *United States*, 380 U.S. 24, 37 (1965), the Court held that it was not unconstitutional to condition an accused's waiver of jury trial upon the consent of the government and court. The Court reasoned that the government was another party to the action with an interest in the choice of jury trial, since the jury is the tribunal regarded by the Constitution as most likely to produce a fair result. *Id.* at 37. Moreover, the Court found that, historically, bench trial was not valued highly. *Id.* at 30. Because it is premised upon the fact that the government, as another litigant, has an interest in the choice of trial forum, *Singer* provides no support for the assertion that either the court or the government has a cognizable interest in a defendant's decision regarding a matter affecting his rights alone.

Moreover, *Faretta* v. *California* rejects the notion that the interests of the court or government can be equivalent to the accused's in his selection of his defense. In spite of the fact that traditional benefits associated with the assistance of counsel are lost when an accused represents himself, 422 U.S. at 835, the Court found that the government could not impose these traditional benefits upon an unwilling accused. The court's and government's interest in maintaining the dignity and fairness of court proceedings, noted by the dissenting Justices, 422 U.S. at 845-47, were not considered worthy of discussion by the majority.

Faretta holds that the accused's knowing choice must govern in decisions affecting his personal right to conduct his defense:

> The value of state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.

Faretta v. *California*, 422 U.S. at 833 34 (footnotes omitted). *Accord United States* v. *Curcio*, 694 F.2d at 25; *United States* v. *Garcia*, 517 F.2d at 278.

The inestimable value of free choice is strongly embedded in the Constitution. In *Adams* v. *United States ex rel. McCann*, 317 U.S. 269 (1942), where the Court held that an accused may waive his right to jury trial without advice of counsel, the Court found that the value of an accused's freedom must outweigh the value of protecting him:

> What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms. . . . When the administration of the criminal law. . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.

Id. at 279-80.

The legitimacy of our criminal justice system is grounded upon respect for the reasoned and considered choice of the accused in matters critical to him. It is the accused's life that will be affected directly by the outcome of a crimi-

nal trial. In countless other contexts, an accused is accorded the right and responsibility to waive what are contrived as protections for him. He may, for example, waive his right to remain silent, his right to confer with counsel, his right to the assistance of counsel at trial, his right to put the government to its proof and his right to be present at trial. His decisions in these circumstances are always respected if voluntary, knowing and intelligent.

There is no claim in this case that petitioners are not aware of theoretical defenses that they might make separately. There is no claim that they have not each knowingly waived separate counsel. Their decisions must be respected, although they may be foresaking protections to which they otherwise are entitled. The protection from unwilling joint representation, conceived as a benefit for an accused, cannot be perverted to prevent him from exercising his correlative right to conduct his own defense through joint counsel.

CONCLUSION

Unless the decision of the Court of Appeals is reversed, this Court will be placing its imprimatur on a process that allows an accused's enlightened self-interest to be disregarded. Overruling an accused's knowing choice of counsel, on the ground that counsel cannot adequately represent him, is especially troubling when his counsel is ousted as a result of the government's motion.[14] When an accused knowingly elects to be jointly represented by counsel, along with his co-defendants, and the only claim of conflict of interest stems from counsel's loyalty potentially being split between them, the Sixth Amendment

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[14] A government motion to disqualify on the ground of ethical conflict may in fact mask baser objectives. *See* Margolin & Coliver, *supra* n.4, at 229 (footnotes omitted):

> It is the author's opinion, based on familiarity with more than a dozen cases in which such disqualification "inquiries" have been filed, that the government's primary motive in bringing such motions is to disqualify the most competent lawyers and firms, with little regard for their reputation for ethical practice. This view is bolstered by the government practice of making selective disqualification motions against some of the defense counsel in a given case, and not other, generally less well-known attorneys, engaged in substantially the same potential conflic. Simply by inviting the court to consider whether any potential conflicts are likely to develop, the government can succeed in putting defense counsel "on trial," using the courts to compel counsel to disclose, explain and justify financial dealings with past clients, as well as the relation of one client to another, as a precondition for remaining counsel in a pending case.

A court that balances a defendant's right to choose counsel against "a likelihood of public suspicion" creates limitless opportunities for a prosecutor to eliminate strong adversaries. *See United States* v. *Hobson*, 672 F.2d 825, 828 (11th Cir.), *cert. denied*, 103 S.Ct. 208 (1982).

provides absolute protection for this choice. An accused's choice of joint counsel, in these circumstances, is his personal choice of the defense he will present.

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April 18, 1983